

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

NO. 5:08-CR-00099-FL-1
NO. 5:11-CV-00166-FL

CHRISTOPHER RAY PARRISH,)
)
)
Petitioner,)
)
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v.)
)
)
UNITED STATES OF AMERICA,)
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)
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Respondent.)
)

**MEMORANDUM &
RECOMMENDATION**

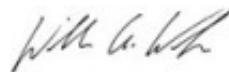
This cause comes before the Court upon Respondent Government's motion to dismiss (DE-58) Petitioner Christopher Parrish's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody ("motion to vacate") (DE-52). Pursuant to 28 U.S.C. 636(b)(1), this matter was referred to the undersigned for the entry of a memorandum and recommendation. In his response to Respondent's motion to dismiss, Parrish contends the recent decision by the Fourth Circuit in United States v. Simmons, ___ F.3d ___, 2011 U.S. App. LEXIS 17038 (4th Cir. Aug. 17, 2011) (en banc), supports his claim that he was improperly sentenced as a career offender. (DE-65). Respondent filed its motion to dismiss May 24, 2011, before the Fourth Circuit announced its decision in Simmons.

To assist the Court in its decisional process, the undersigned directed Respondent to file a supplemental memorandum informing the Court of its position in light of the Fourth Circuit's en banc decision in Simmons. (DE-66). Respondent has now filed its supplemental memorandum,

in which it concedes that “[b]ecause the petitioner was punishable for a term of incarceration of less than one year for [his] two prior drug convictions, his argument for relief pursuant to *Simmons* has merit.” (DE-67, p.3). Respondent “believes it would be appropriate for the probation office to recalculate [Parrish’s] advisory guideline range” and “recommend[s] that the Court re-sentence him in light of *Simmons*.¹” (*Id.*).

As Respondent now agrees that the sentence Parrish received “was in excess of the maximum authorized by law,” 28 U.S.C. § 2255(a), the undersigned hereby RECOMMENDS that Respondent’s motion to dismiss (DE-58) be DENIED, that Parrish’s motion to vacate (DE-52) be GRANTED, and that Parrish be resentenced in accordance with the Fourth Circuit’s decision in Simmons.

SO RECOMMENDED in Chambers at Raleigh, North Carolina on Tuesday, October 4, 2011.



WILLIAM A. WEBB
UNITED STATES MAGISTRATE JUDGE